



# Oregon

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Mr. Jeffrey M. Senger  
Deputy Senior Counsel for Dispute Resolution  
U.S. Department of Justice  
950 Pennsylvania Ave., NW, Room 4328  
Washington DC 20530



Dear Mr. Senger:

I am writing in response to the document titled "Confidentiality in Federal Alternative Dispute Resolution Programs."

The narrative says this report is a result of the ADR Working Group Steering Committee to outline "reasonable expectations of confidentiality for parties in federal dispute resolution." This is a significant statement.

This report is extremely important for ADR programs that involve federal funding. For nearly seven years (1990-1997), the Oregon Department of Agriculture (ODA) participated in a partnership program with the U.S. Department of Agriculture in providing mediation services to farmers who were experience financial problems with lenders. The USDA provided matching funding for this program. ODA provided the program structure and mediators for this service. At the time, some 20 states participated in this program.

Due to issues of confidentiality that arose when the Inspector General of the U.S. Department of Agriculture issued requests for mediation case files, our agency dropped out of the program over concerns relating to the disregard of state and federal confidentiality protections and the integrity of the program based on that premise.

I have concerns that the proposed report/rule leaves too much open to interpretation and the ability of federal agencies to demand confidential information from mediation programs or participants without either going through a court order to show cause, or having the full agreement of all parties to release information that was discussed in a mediation -- and this should not take the form of a waiver of confidentiality rights as is now done with the USDA mediation program (state agencies have to sign agreements that grant USDA access to any records developed through mediation programs supported by USDA funds; and participants have to be informed and consent to the release of any records prior to participating in a mediation through these programs).



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Two key areas of concern in the Justice Dept. proposal include:

First, in the analysis of the confidentiality provisions of the ADR Act, the report points out in question #8 that "In general, neither a neutral nor a party can be required to disclose dispute resolution communications through discovery or compulsory process. Compulsory processes include any administrative, judicial or regulatory process that compels action by an individual. Citation: 5 USC 574(a) & 574(b)."

Yet the report indicates that "a party's own communications made during a dispute resolution proceeding are not protected by the ADR Act..."

The Act actually says: "A party to a dispute resolution proceeding shall not ...be required to disclose any dispute resolution communication unless the communication was prepared by the party seeking disclosure..." 5 USC 574(b)(1)

An applicable situation may be when a party prepared some data or a proposal and had only one copy that was circulated, and that copy was taken by another party. The originating party could request that the communication be disclosed (or returned). It certainly isn't saying that some outside entity, who is not a "party" to the mediation, can demand disclosure from each party individually for whatever communication they prepared. That flies in the face of the whole concept of confidentiality protection.

Second, the report notes that the legislative history and reading of the statute at 5 USC 574(b)(7) exempts any communication from confidentiality protection that is made in the presence of all parties to the dispute.

The language of the statute reads: "A party to a dispute resolution proceeding shall not...be required to disclose any dispute resolution communication unless (7) except for dispute resolution communications generated by the neutral, the dispute resolution communication was provided to or was available to all parties to the dispute resolution proceeding.

There's a double negative in here that makes this provision difficult to interpret (unless/except).

The report states: "A neutral may not disclose communications made in joint session. However, there is no prohibition against a party disclosing communications available to everyone in the proceeding." The report then cites legislative history H.R. Rep. No. 104-841, 142 Cong. Rec H11, 110 (Sept. 25, 1996) stating "A dispute resolution communication originating

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from a party to a party or parties is not protected from disclosure by the ADR Act."

It appears that this interpretation is taken out of context. The intent here is to prevent the neutral from disclosing communications made to him/her in confidence to the entire group. It is not saying that communications to the entire group have no confidentiality protection -- that again would fly in the face of the definition of a communication made in mediation contained in the ADR Act.

These two "exceptions" cited in the report -- communications prepared by the party(ies), and communications made to the group as a whole -- essentially comprise virtually all the communications made in mediation except those made directly to the neutral mediator. To argue that these are exceptions to the confidentiality protection is to argue that almost nothing in mediation is confidential (or protected from disclosure or demands from an outside entity seeking information).

Indeed there would be no "reasonable expectation of confidentiality" under such a scenario -- which is exactly why this agency no longer participates in federal mediation through the U.S. Department of Agriculture.

The proposals in the report essentially provide the ability for federal agencies to embark on "fishing expeditions" of repeated requests for confidential case files. Because Oregon state laws provide for confidentiality protection of mediation communications (as do many other states), we express extreme concern over the report as drafted.

I strongly encourage the working group to revisit these issues and discuss the ramifications with affected programs and parties that have participated in mediations with federal agencies or with federal funding. These are significant issues that need full airing and discussion.

Thank you for your consideration.

A handwritten signature in black ink, appearing to read "Brent Searle", with a long horizontal flourish extending to the right.

Brent Searle  
Farm Mediation Program Coordinator